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Summary record of the 3112th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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the State exercising jurisdiction that the official enjoyed immunity and had to substantiate the claim of immunity.

59. Applying the same logic to serving Heads of State, Heads of Government or Ministers for Foreign Affairs who enjoyed personal immunity gave the opposite result: the State exercising jurisdiction should raise the issue of immunity itself. All such officials were, as a rule, well known to foreign States. They enjoyed immunity in respect of actions undertaken in both their official and personal capacities. Consequently, the State of the official was under no obligation to invoke immunity before the authorities of the State exercising jurisdiction.

60. The above conclusions were confirmed, in his view, by the judgment of the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.

61. With regard to the means of invoking immunity, his third report concluded that the State of an official was not obliged to invoke immunity before a foreign court, and that it sufficed to do so through diplomatic channels. The absence of an obligation on the part of the State to deal directly with a foreign court stemmed from the principle of the sovereign equality of States. The issue of immunity from foreign criminal jurisdiction often arose and was resolved at the pretrial stage.

62. Concerning waiver of immunity, he said that the right to waive an official's immunity, like the right to invoke immunity, lay with the State and not with the official, for the same reasons.

63. The means of waiving immunity varied. In the case of State officials belonging to the troika, the waiver must be express. Any possible exceptions would be largely hypothetical. On the other hand, waiver of the personal immunity of officials not included in the troika and of the functional immunity of other officials could be either express or implied. Importantly, an implied waiver could take the form of failure by the official's State to invoke immunity.

64. Thus, who must invoke immunity and who must waive it depended on who it was that enjoyed immunity—a member of the troika or another State official. In either case, members of the troika were in a privileged position.

65. His third report also examined the relationship between the invocation or waiver of an official's immunity by the State of the official and the responsibility of that State. The relationship was based on the fact that conduct presumed unlawful could be attributed to the official and the State of the official simultaneously.

66. First, a State which invoked its official's immunity on the grounds that the act with which that person was charged was of an official nature was acknowledging the fact that the act was an act of the State itself. That established significant premises for the responsibility under the international law of the State in question. The fact that the burden of invoking functional immunity lay with the official's State left that State with a choice: to declare that an official's or former official's actions were official in nature, thereby acknowledging the action as its own, with all the attendant political and legal consequences; or not to do so, thus allowing the foreign State to prosecute the official concerned. Cases of the latter were known to have occurred.

67. Secondly, the State of an official could acknowledge that he or she had acted in an official capacity, but not invoke immunity, as in the *"Rainbow Warrior"* incident. In itself, such recognition did not relieve the official of responsibility, as attributing conduct to the State did not preclude attributing it to the official as well.

68. Thirdly, the State could opt not to declare that its official's acts were of an official nature, and thus not invoke functional immunity. It could even declare that the official had acted in his or her personal capacity and consequently did not enjoy immunity. That did not mean, however, that the State exercising jurisdiction could not deem the acts to have been carried out in an official capacity. In such a case, that State could then not only bring criminal proceedings against the foreign official, but also, if the acts were internationally wrongful, raise the question of the international responsibility of the official's State, on grounds of dual attribution.

69. In conclusion, he said that the consideration of the issues dealt with in his third report would help to strike an appropriate balance between immunity of State officials from foreign criminal jurisdiction and responsibility for crimes committed.

The meeting rose at 5.55 p.m.

3112th MEETING

Tuesday, 26 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*concluded*)*

[Agenda item 13]

STATEMENT BY THE SECRETARY-GENERAL OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The CHAIRPERSON welcomed the Secretary-General of the Asian–African Legal Consultative Organization (AALCO), Mr. Rahmat Mohamad, and invited him to take the floor.

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* Resumed from the 3108th meeting.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO continued to attach great importance to its long-standing relationship with the Commission and would endeavour to further strengthen that relationship in the years to come.

3. One of the statutory obligations of AALCO was to examine the questions that were under consideration by the International Law Commission and to forward the views of its member States to the Commission.

4. The fiftieth annual session of AALCO had been held in Colombo, Sri Lanka, from 27 June to 1 July 2011. The Eminent Persons Group constituted on that occasion as an advisory body to guide the work of AALCO included four members of the International Law Commission.[368]

5. The deliberations on the work of the Commission had been held on 27 June 2011. In his introductory statement at the annual session, the Secretary-General of AALCO had given a brief overview of the work of the Commission at its sixty-second session and had emphasized that inputs from AALCO member States would be of immense significance to the Commission in formulating the future direction of its work and that the feedback and information on State practice in Asia and Africa would enable the Commission to take into consideration the views of diverse legal systems.

6. Two of the members of the Eminent Persons Group who were also members of the Commission had spoken in their personal capacity on the topics "Effects of armed conflicts on treaties" and "Immunity of State officials from foreign criminal jurisdiction".[369] Their complete statements were contained in the record of the debate, which would be distributed to all members of the Commission.

7. The delegations of China, Indonesia, the Islamic Republic of Iran, Japan, Kuwait, Malaysia and Saudi Arabia had expressed their views on various topics on the Commission's agenda.

8. On the topic "Effects of armed conflicts on treaties", one delegation had noted that draft article 2 included express reference to the applicability of the draft articles to non-international armed conflicts and that it had continued to deem such an inclusion to be inappropriate. The effects that that category of conflicts might have on treaties were governed by the provisions on circumstances precluding wrongfulness of the draft articles on international responsibility of States for internationally wrongful acts.[370] Moreover, article 73 of the 1969 Vienna Convention, which was the basis of the Commission's work on the subject, referred exclusively to the effects on treaties of armed conflicts between States. In the view of another delegation, the definition of armed conflict was insufficiently restrictive and could easily be construed as allowing any use of force, which in turn could affect the stability of treaty relations.

9. With regard to the topic "Expulsion of aliens", one delegation had underscored that expulsion must take place with due respect for the fundamental human rights of the deportees. Another delegation had been of the view that nothing should stand in the way of extradition of an alien to a requesting State when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. A third delegation had observed that the topic should be addressed primarily from the standpoint of international human rights law, rather than from the perspective of the principles of sovereignty and non-intervention, and had emphasized that, above and beyond the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers, could be afforded additional protection against expulsion and other procedural guarantees.

10. Concerning the topic "Protection of persons in the event of disasters", one delegation had noted that it was for the affected State to determine whether receiving external assistance in the event of a disaster was appropriate. Any suggestion to penalize the affected States would be contrary to international law. Another delegation had observed that humanitarian assistance should be undertaken solely with the consent of the affected State, with strict respect for the principles of national sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of States. Yet another delegation had reiterated that the affected State had the principal right, and the obligation, to meet the needs of victims of disasters within its borders. The affected State had the right to decide where, when and how relief operations were to be conducted and had the power to dictate the terms of the humanitarian response.

11. In respect of the topic "Responsibility of international organizations", one delegation had underlined the importance of the draft articles on the responsibility of international organizations adopted on second reading by the Drafting Committee during the current session of the Commission and recommended that the AALCO secretariat undertake a study on the subject and submit a comprehensive report on it to the next annual session.

12. With regard to the topic "The law of transboundary aquifers", one delegation had recalled that, with a view to providing a legal framework for the proper management of groundwater resources, the Commission had formulated a set of 19 draft articles on the subject.[371] That delegation had suggested that the draft articles be adopted either as a universal treaty at a diplomatic conference or as a declaration by the United Nations General Assembly. Another delegation, while acknowledging the importance of the topic of transboundary aquifers, given the global water crisis, had argued that the draft articles would be more useful in the form of guidelines than in a legally binding form and that States could enter into appropriate bilateral or regional arrangements for the

[368] For a list of the members of the Eminent Persons Group, see the Summary Report of the Fiftieth Annual Session of the Asian–African Legal Consultative Organization, 27 June–1 July 2011, Colombo, Sri Lanka, p. 27, para. 5.25.

[369] *Ibid*., pp. 31–33, paras. 6.4–6.7.

[370] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[371] *Yearbook … 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54.

proper management of their transboundary aquifers, as recommended by the Commission, subject to their having the necessary capacity and resources.

13. On the topic "Reservations to treaties", one delegation had observed that member States should study the draft guidelines carefully in the light of their respective practice and express their positions during the debate on the topic in the Sixth Committee.

14. One delegation had supported the proposed topic on international environmental law, since the Commission would be able to contribute effectively towards clarifying and redefining the basic principles and rules in that area.

15. Two delegations had favoured consideration by the Commission of the topic proposed by Mr. Murase on protection of the atmosphere. One delegation had stated that this had been made necessary by the fact that there existed significant gaps in the applicable principles and rules of international law in the field, and it had requested AALCO member States to give the proposal serious consideration and to support it.

16. In relation to the topic "The most-favoured-nation clause", one delegation had been of the view that it must be addressed in the context of the agreements of the WTO and the many regional economic agreements, customs unions, bilateral free trade agreements, bilateral investment treaties and investment guarantee agreements. Most-favoured-nation clauses were closely intertwined with the bilateral and regional interests of the States involved, were driven by domestic policies and issues of State sovereignty, and were politically sensitive and technically and operationally complex. Other trade-related bodies, such as the WTO, the United Nations Conference on Trade and Development (UNCTAD) and OECD, were already undertaking studies on the subject; the Commission's work must not overlap with studies already under way to which States were making a more direct contribution.

17. The delegations had also formulated a number of general comments and observations. One delegation had been in favour of sending young AALCO interns to the Commission and had proposed that the members of the Commission from African and Asian countries open their doors to them on the recommendation of the respective Governments, subject to applicable Commission rules and procedure. The same delegation had also called for the report of the Commission to be made available at least one month before it was considered by the Sixth Committee so as to facilitate its in-depth examination.

18. Another delegation had pointed out that there were three ways for the Commission to obtain the opinions of AALCO member States. It could seek their opinion before a topic was taken up, it could elicit the viewpoints of States by circulating questionnaires during its work or it could ask them to comment on draft articles already adopted. That delegation had urged the member States of AALCO to respond to those requests and to participate in the Sixth Committee's consideration of the Commission's report so that their views and positions could have an impact on the outcome of the Commission's work.

19. Stressing the need for African and Asian States to make a substantial contribution to the work of the Commission, one delegation had suggested that the AALCO secretariat produce a questionnaire on each topic dealt with by the Commission and then communicate the responses to the secretariat of the Commission. Slowly but surely, that exercise would affect the formation and substance of customary international law.

20. Some delegations had been of the view that the annual sessions of AALCO should devote more time for deliberating on the agenda item on the work of the Commission. Taking that suggestion into account, AALCO had adopted a resolution at its fiftieth annual session requesting the Secretary-General to consider holding a special meeting on that topic at the next annual session.

21. The CHAIRPERSON thanked Mr. Mohamad for his report on the activities of AALCO and invited members of the Commission who so wished to ask questions.

22. Mr. MURASE regretted that some members of the Commission from African and Asian States had not participated sufficiently in its work, no doubt because they were too busy with other tasks. Not only was that a loss for the Commission, but it could only perpetuate the current situation of international law, which was under the predominant influence of Western States.

23. Mr. HASSOUNA welcomed the determination expressed by a number of AALCO member States to collaborate more closely with the Commission, and in particular the proposals concerning an enhanced contribution to the work of the Sixth Committee and the response to questionnaires which the Commission sent to Member States. He stressed, however, that AALCO must follow up on those good intentions. He asked what contacts AALCO had established and developed with regional legal organizations in Europe and Latin America, and he would also like to have some information on the modalities for the funding of the organization, in particular with regard to the involvement of the private sector.

24. Mr. PERERA said that, as noted by the Secretary-General of AALCO, one of the organization's statutory obligations was to examine topics that were under consideration in the Commission. AALCO should devote more time to that item of its agenda: at least half a day should be set aside for that purpose. The proposal to hold a special session on the work of the Commission was a positive step in that direction. Concerning the working methods of AALCO, he endorsed the idea of establishing working groups, as had been done in the past.

25. Mr. HMOUD, pointing out that the New York office of AALCO was very active, said that the organization should look into the possibility of opening offices in other cities in which there was major activity in the area of international law. He asked whether AALCO had taken any initiatives to promote inter-State cooperation in the various fields of law, for example judicial cooperation or matters of regional interest. It would also be interesting to hear what steps had been taken to strengthen the institutional framework of AALCO and whether there were plans to encourage a greater involvement of AALCO

member States and other African and Asian States in the work of the organization, given that currently only seven or eight States participated actively.

26. Mr. NOLTE asked whether AALCO intended to address questions raised in the context of the "Arab Spring" and whether its consultative services had been solicited or offered.

27. Mr. WISNUMURTI welcomed the creation of the Eminent Persons Group announced by the Secretary-General of AALCO. He advocated closer cooperation between AALCO and the Commission, which could be achieved by ensuring that the comments of the members of AALCO were forwarded to the Commission and by taking steps to arrange for internships.

28. Mr. SINGH, observing that AALCO discussed topics that were on the Commission's agenda, noted that, at its latest session, it had commented on the current work of the Commission and had concluded that it should also focus on work that it had completed and had been the subject of proposals and recommendations which it had addressed to the Sixth Committee. AALCO had also discussed the question of the implementation of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was based on the work of the Commission.[372] All those matters were very important for the member States of AALCO, which should continue monitoring those topics in order to ensure the full implementation in the member States of conventions that had been adopted. As underscored by the Secretary-General of AALCO, the Commission should take into account inputs from AALCO member States when considering items on its agenda.

29. Mr. McRAE noted that an African Union Commission on International Law had been created and asked whether AALCO had had contact with it and whether it could provide some details on its work.

30. Sir Michael WOOD said that he was grateful to Mr. Murase, Mr. Perera and Mr. Singh for having attended the latest session of AALCO, because that helped maintain good relations between AALCO and the Commission. Noting that Mr. Murase had raised the question of attendance at the Commission, he said that there were very active members from all regional groups, and he did not accept the view that some groups were less active and less influential than others. As indicated by Mr. Singh, it was very useful that AALCO discussed items on the Commission's agenda, as well as work that it had completed, such as on transboundary aquifers or the United Nations Convention on Jurisdictional Immunities of States and Their Property. He hoped that the comments made at the Colombo meeting would lead to positive results and that other countries, in particular from Africa and Asia, would become parties to that instrument. He enquired whether AALCO planned to consider the work of the Commission on reservations to treaties, and especially the Guide to Practice, which was to be completed at the current session. It would be very helpful if AALCO could examine the reservations dialogue—which did not consist merely in objecting to reservations but also in discussing them with the reserving States—and the activities of CAHDI in that area. He also asked about the composition of AALCO, whose membership seemed limited, and about the status of observer States and guests.

31. Mr. CANDIOTI, noting that the Commission had just completed its consideration of three important topics and was reflecting on possible future topics to be included in its long-term programme of work, asked whether AALCO could indicate, for example at the meeting to be held in New York, what new topics it would like the Commission to examine or whether it deemed it useful for the Commission to review certain issues which it had already addressed.

32. Mr. VASCIANNIE asked whether AALCO could forward its report to the Commission earlier, which could then make better use of comments on its work. He also enquired whether AALCO planned to adopt group positions on any subjects, since it would be helpful for the Commission if it knew, for instance, that 30 States shared the same view on a particular question.

33. Mr. DUGARD, noting that only States could be members of AALCO but that persons other than representatives of those States could attend its meetings, as for example Mr. Murase did, asked whether AALCO encouraged legal practitioners and academics from Africa and Asia to do so, in particular those living in the diaspora, notably in Europe and the United States, and who made a great contribution to international law in general but perhaps not sufficiently in their own region. Mr. Murase had referred to the failure of some of the members of the Commission who were from African or Asian States to attend its meetings regularly. One problem was that two African States had appointed their attorneys general to the Commission, which meant that they were, almost by definition, unable to attend regularly. AALCO could perhaps serve as a forum for identifying African and Asian legal practitioners who might be appointed to the Commission.

34. Mr. GALICKI said that it was always useful for the Commission to be able to count on comments from an organization that represented a large number of States. He would like to have the view of AALCO on the impact of the Commission's work and asked in particular whether, in the opinion of its members, the Commission should continue to produce draft articles or whether it should elaborate conventions or, as in the case of the topic on reservations to treaties, guidelines.

35. The CHAIRPERSON, speaking as a member of the Commission, said that the AALCO report had given him the impression that there was a lag between the moment AALCO commented on a topic and the state of work in the Commission on that topic. If AALCO had been informed of the latest developments within the Commission, its comments would have been different. He suggested that AALCO invite to the part of its sessions devoted to the work of the Commission the special rapporteurs for the topics of particular interest to it, because that way it

[372] *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 28 (draft articles on jurisdictional immunities of States and their property and commentaries thereto).

could be informed of progress made on the topic in the Commission and could prepare its comments, which were very useful to the special rapporteurs. He also asked whether AALCO could elaborate joint positions, without prejudice to the individual positions of its members, because such positions would have a much greater impact on the work of the Commission and perhaps on the discussions in the Sixth Committee as well. He wondered whether it might not be necessary to improve the participation of African States in the work of AALCO, since the fact that the organization's headquarters were in Asia posed problems of costs, which could be prohibitive for many countries.

36. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that some of the questions exceeded his remit as Secretary-General, notably the one on how to encourage more African and Asian countries to participate actively in the work of AALCO. At its annual session, AALCO devoted an hour and a half to the work of the Commission, but it was planned to set aside half a day for that purpose as from 2012. An intersessional meeting was also being considered, at which member States would be invited to discuss questions of interest to the Commission. The creation of the Eminent Persons Group, in which several members of the Commission took part, would help AALCO to be informed about the Commission's current work. Most member States found it difficult to understand the Commission's work, because they did not have the necessary expertise or specialists. It was important to bear in mind that, unlike their European counterparts, most of the African and Asian members of the Commission did not have interns or assistant researchers to help them. For that reason, he had proposed the establishment of a foundation to solicit contributions, because AALCO, like other international organizations, was short of funding. Non-State entities could also contribute to the foundation in the framework of cooperation on specific projects. Member States would also need to be persuaded to pay their contributions; that was not always easy to do. In order to show States how they benefited from their membership, AALCO had set up training and capacity-building programmes as part of cooperation with WTO on trade questions, with the World Intellectual Property Organization on indigenous and traditional knowledge, and with UNCTAD.

37. A number of intersessional activities were taking place, for example the meeting of legal experts on the Rome Statute of the International Criminal Court. However, that required financial resources, and not all representatives of member States could travel regularly to New Delhi. For that reason, AALCO planned to hold online workshops, conferences and seminars on its website.

38. With regard to the relatively limited membership of AALCO, he said that, as Secretary-General, he was working to encourage more countries to become members. The Eminent Persons Group was responsible for seeking assistance in promoting a high profile for the organization. AALCO invited permanent observers from non-member States, including Australia, the Congo, Kazakhstan, New Zealand and the Russian Federation, to attend its annual sessions.

39. AALCO intended to discuss the future work of the Commission at the meeting to be held in October 2011 in New York and to solicit ideas from member States; it also cooperated with ASEAN and the African Union. Although it had not yet approached the legal advisers of the European Union or the OAS, that was one of his priorities, because he was aware of the value of working with other regional organizations.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*continued*) (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

40. The CHAIRPERSON invited the members of the Commission to resume consideration of the fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/648).

41. Mr. NOLTE, noting that the report dealt with the different possible sources of an obligation or obligations to extradite or prosecute, said he agreed that the main possible sources for such obligations were treaties and customary international law and that the principle of cooperation played an important underlying role in that regard. He had doubts, however, whether the Special Rapporteur had gone far enough: although draft article 3 (Treaty as a source of the obligation to extradite or prosecute) was clearly correct, ultimately it was merely a way of saying that treaties must be complied with, or *pacta sunt servanda*. To make that proposition, it was not necessary to classify the different kinds of treaties that contained obligations to extradite or prosecute. Such a classification would instead be important either for showing that those treaties articulated a general principle or a rule of customary international law, or for suggesting that the obligation to extradite or prosecute was applicable to certain core crimes or that it had certain more specific procedural implications.

42. Draft article 4 concerned the much more difficult issue of the possible customary nature of the obligation or obligations to extradite or prosecute, and its formulation showed that the Special Rapporteur was undecided on the question. While it was, again, clearly correct that States were obliged to extradite or prosecute an alleged offender if such an obligation was derived from international law, the Special Rapporteur did not go so far as to say that such an obligation existed, even with respect to certain core crimes. Indeed, the material which the Special Rapporteur presented to substantiate a possible customary obligation to extradite or prosecute was limited. The non-binding resolutions and certain propositions advanced by parties in judicial proceedings as such and without further reasoning did not appear to be sufficient to establish a basis in customary international law for an obligation to extradite or prosecute. He did not rule out that other material or considerations could lead to such a conclusion, but the sources contained in the report did not support a stronger formulation than what the Special Rapporteur proposed in draft article 4, paragraph 2. However, that provision referred back to other norms without specifying them and ultimately left the question open. Bearing in mind that

the formulation in paragraph 2 cautiously stated that the obligation to extradite or prosecute "may" derive from customary norms of international law, it was somewhat surprising that the Special Rapporteur proposed in paragraph 3 that an obligation to extradite or prosecute "shall" derive from peremptory norms of international law. As noted by Mr. Dugard, that compulsory language was at variance with the doubts which the Special Rapporteur had himself expressed in paragraph 94 of his report.

43. With regard to draft article 2 (Duty to cooperate), once again the question was not whether such a general duty existed, but what it meant in the context of international criminal cooperation. There, it would seem to be necessary to assess how far the political goal of the fight against impunity had crystallized into more specific legal obligations, in particular in customary international law. That would require an analysis of possible countervailing considerations, which the Special Rapporteur alluded to in paragraph 74, but did not examine further.

44. In sum, the fourth report on the obligation to extradite or prosecute was a valuable contribution to the Commission's consideration of the topic, but the issues that it raised needed to be studied further. It was not yet possible for the aspects of the topic that had been raised in the report to be dealt with as drafting matters. He did not agree with Mr. Murase that the Commission should abandon the topic, which, as Mr. Dugard had observed, was important and had raised expectations. There was a need to reflect on how to proceed further, but owing to lack of time, that would be an appropriate task for a newly elected Commission. He was not persuaded by Mr. Melescanu's proposal that the Commission should submit the proposed draft articles to the Sixth Committee for debate. The Commission should not abandon its most important task, that of forming a collective opinion, and thus forego its privilege of submitting a considered view to the General Assembly.

45. Mr. PERERA thanked the Special Rapporteur for his fourth report and for his detailed introduction at the previous meeting. He shared the views expressed by other members of the Commission concerning the particular difficulties surrounding the treatment of the topic, notably whether and to what extent an obligation to extradite or prosecute had a basis in customary international law. The Special Rapporteur had sought to address that issue in sections C to F of the last chapter of the report, on which he personally wished to make several comments.

46. During the debate in the Sixth Committee in 2009, special attention had been given to the possible customary law character of the obligation *aut dedere aut judicare*.[373] In section D of the report, the Special Rapporteur sought to capture the range of views that had emerged. Some delegations had considered that international treaties were not the sole source of the obligation to extradite or prosecute, which in their opinion was an obligation of a customary nature, notably in respect of serious international crimes. Others had argued that the obligation did not exist beyond the provisions of international treaties. The same difference of opinion existed in the Commission. Yet other delegations had expressed a third view, one which merited further consideration, namely that a customary rule might be in the process of emerging, at least in respect of a limited category of crimes. The challenge was to determine what categories of crimes were core crimes. In section F of his report, the Special Rapporteur had dealt in a preliminary manner with the question of the identification of crimes and offences that could be classified as giving rise to the customary obligation to extradite or prosecute, and in that context he had proposed draft article 4. In paragraph 87, the Special Rapporteur referred to the necessity of differentiating between ordinary criminal offences—criminalized under national laws of States—and a "qualified" form of such offences or crimes, named in different ways as international crimes, crimes of international concern, grave breaches or crimes against international humanitarian law, or what were referred to as core crimes. In that connection, the Special Rapporteur observed in that same paragraph that those last crimes, in particular, possessing a combination of additional elements of international scope or a special grave character, could be considered as giving a sufficient customary basis for the application of the obligation *aut dedere aut judicare*. He was personally of the view that the severity of the offence must be the decisive factor in determining the list of crimes to be covered in draft article 4, paragraph 2, the wording of which was tentative in nature, as a number of members of the Commission had noted.

47. Serious consideration should be given to the question of the inclusion of the crimes defined in the set of conventions on suppression of terrorism, which had as their underlying rationale the prevention of safe haven being afforded to perpetrators of indiscriminate violence against civilians. An examination of the treaty sources of the obligation to extradite or prosecute showed that that obligation had had a limited character in early instruments, such as the 1929 International Convention for the Suppression of Counterfeiting Currency or the Convention for the Prevention and Punishment of Terrorism, adopted by the League of Nations in 1937 (but which had never entered into force), in which the obligation had been formulated to address the particular problems arising from the practice of certain States of not extraditing their own nationals. However, as noted in paragraph 57 of the report, the evolution of the obligation to extradite or prosecute towards an obligation of an absolute nature was best illustrated in the 1970 Convention for the suppression of unlawful seizure of aircraft, which required contracting States, if they did not extradite an offender, to submit the case to their competent authorities for prosecution, without exception whatsoever and regardless of whether the offence had been committed in their territory. That instrument had set a precedent and had had a clear impact on conventions that had followed in the field. The *aut dedere aut judicare* clause had been incorporated almost verbatim in a number of international conventions on terrorism, culminating in the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. It was also found in the negotiating text of the draft comprehensive convention on international terrorism.[374] At the regional

[373] See, *inter alia*, the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, prepared by the Secretariat (A/CN.4/620 and Add.1), sect. F, pp. 15–16 (available from the Commission's website).

[374] See General Assembly resolution 65/34 of 6 December 2010, on "Measures to eliminate international terrorism", paras. 22–24.

level, the obligation was reflected in virtually the same terms in the 1977 European Convention on the suppression of terrorism and the 1987 SAARC [South Asian Association for Regional Cooperation] Regional Convention on Suppression of Terrorism. It was also enunciated in important documents such as the General Assembly's 1994 Declaration on Measures to Eliminate International Terrorism, which called upon States "[t]o ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law".[375] A number of General Assembly and Security Council resolutions recognized that

> [a]cts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society.[376]

48. All those elements needed to be duly considered in assessing whether the grave crimes covered under those instruments possessed a sufficient customary basis—through long and continuous State practice, as distinct from their original treaty-based character—to warrant their inclusion in the category of war crimes envisaged in draft article 4. He agreed with Mr. Vasciannie that the question was a stimulating one, that the Special Rapporteur should undertake a more detailed study of State practice and that draft article 4 had the potential to become a substantive rule.

49. On draft articles 2 and 3, he shared the general view that they needed to be worked on further during the next quinquennium. The draft articles could be annexed to the annual report of the Commission to the General Assembly, as proposed by Mr. Melescanu, and considered by a working group to be constituted within the framework of the future Commission.

50. Mr. PELLET said that, unlike others, he was of the view that the Commission had the mandate and the expertise to consider what he regarded as a very useful topic. However, it would have been preferable for the Commission to address the question of universal jurisdiction as a whole, rather than dealing with the current downstream subject, which was closely linked to universal jurisdiction, including its very definition. It was difficult to examine the question of the obligation to extradite or prosecute without first having a very clear idea of what universal jurisdiction was. That was particularly apparent in the fourth report. In it, the Special Rapporteur raised the question of the legal bases of the obligation to extradite or prosecute, and personally he was inclined to think that they were the same as for universal jurisdiction. Actually, the bases were extrajuridical, like any basis of law, a fact of which he, as a proponent of juridical objectivism, was absolutely convinced. Given that, in contemporary society, certain crimes were intolerable and were prejudicial to the most universally recognized values, all States—perhaps subject to certain conditions—were competent to prosecute the alleged perpetrators of those crimes (universal jurisdiction), and if a State did not prosecute such persons, it must extradite them. Of course, if the latter principle was to apply, competence to prosecute must be established, which in essence was a question of universal jurisdiction. The Special Rapporteur then considered the sources of the obligation to extradite or prosecute. There again, he personally thought that it was difficult to separate the study of that question from a study of the sources of universal jurisdiction, given that the Special Rapporteur no doubt had an excessively broad understanding of the concept of "source", since he included in it the duty to cooperate in the fight against impunity. However, that question was more one of legal basis than of sources, and if it was the source that was concerned, it would be a material source and not a formal one. That said, he agreed with the idea that the principle *aut dedere aut judicare* had its basis, or its material source, in the duty to cooperate in the fight against impunity. However, that was also the case with universal jurisdiction, whereas the duty or the obligation to cooperate (the Special Rapporteur did not give any thought to the choice of that word) was perhaps more directly at the root of the principle *aut dedere aut judicare* than the principle of universal jurisdiction.

51. He had no objection of principle to draft article 2, although he had his doubts about the French version. He was not in favour of the restrictions attached to the duty to cooperate in the wording proposed by the Special Rapporteur, which perhaps was good diplomacy, but it was not good law. With regard to crimes for which universal jurisdiction and the principle *aut dedere aut judicare* were applicable, it was perfectly clear that a general obligation was involved that bound States at all times and places and in all circumstances. On the other hand, he was not persuaded by the very general formulation proposed by the Special Rapporteur at the end of paragraph 1 of draft article 2, which read: "the fight against impunity as it concerns crimes and offences of international concern". Neither universal jurisdiction nor the obligation to extradite or prosecute was applicable to all international crimes, and even less so to all offences of international concern which were not crimes.

52. Although it was not the subject of a separate section in the fourth report, the Special Rapporteur also repeatedly raised the question of which international crimes would entail application of the principle *aut dedere aut judicare*. There again, he was personally convinced that that question should not be separated from the question of crimes that warranted recourse to universal jurisdiction. The answer to that question was more or less the same in both cases: those principles were certainly applicable when the treaties in force so provided and in the conditions which they set. However, there was nothing startling about that firm conclusion, which was set out in draft article 3, paragraph 1. To say that a State was bound to extradite or prosecute a person accused of an offence if a treaty to which it was party required it to do so was tantamount to reinventing *pacta sunt servanda*, as Mr. Nolte had just pointed out, and was not much use. It was even dangerous, because it might give the impression that, if the future articles of the Commission on the subject did not say so, it was not the case. As to paragraph 2, the purpose of which seemed to be to specify the details of the application of the principle, it was very

[375] General Assembly resolution 49/60 of 9 December 1994, annex, para. 5 (*b*).

[376] *Ibid*., para. 2.

unclear. It referred to general principles of international criminal law, but it was those very principles that had to be defined, and that was not a problem of source but of application and modalities. Accordingly, the problem was inherent in the principle *aut dedere aut judicare* without being entirely unrelated to universal jurisdiction, because, at least in the drafting formulated in paragraph 71, the point was to ascertain under what conditions a State could or must extradite or prosecute when it had competence to prosecute, whether in accordance with universal jurisdiction or for other reasons.

53. Even more fundamental was the question of the possibly customary nature of the principle *aut dedere aut judicare*. The link between that principle and universal jurisdiction also seemed essential. Treaties might separate the two principles and require extradition or prosecution in the absence of universal jurisdiction, but that appeared to be excluded when considered from the point of view of custom. He was firmly convinced that neither the maxim *aut dedere aut judicare* nor universal jurisdiction was applicable without distinction on a customary basis to all internationally defined crimes. If they were applicable, it was the case with certainty for only the four most serious crimes, or in any event for three of them, namely genocide, crimes against humanity and war crimes, although it seemed absurd to place war crimes on the same footing as genocide and crimes against humanity or on the same footing as aggression. Incidentally, he noted that, even after the Review Conference of the International Criminal Court,[377] it was clear that aggression posed particular problems and that it was better to put it aside for the time being.

54. In any case, he had no doubt, despite those difficulties, that universal jurisdiction and *aut dedere aut judicare* were applicable to the four most serious crimes on a customary basis, as recognized by the Commission's draft code of crimes against the peace and security of mankind,[378] which unfortunately had not received the attention it deserved, and to which the Special Rapporteur referred in paragraph 89 of the report. However, there again, the wording of draft article 4 was too weak and did not say very much. He was not convinced by the use of the word "if" in paragraph 1. The whole point was that the Commission should indicate when that condition was met. Similarly, paragraph 2 stated that the obligation *aut dedere aut judicare* "may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes]". Yes, but when was that the case? He was in full agreement with the first three examples in the short and convincing enumeration in the square brackets, but wondered why the Special Rapporteur referred to war crimes, which were already covered by the reference to serious violations of international humanitarian law; that seemed sufficient and in fact quite satisfactory, because it limited the scope of the article to grave violations without extending it to all war crimes, which he would disapprove.

55. He did not understand draft article 4, paragraph 3. The fourth report raised interesting questions which could probably also have been the subject of interesting discussions in a working group, but the Commission was at the end of the session, and it was too late to envisage setting up such a group again. As the Commission was also approaching the end of the quinquennium, it was inappropriate to refer the three draft articles proposed by the Special Rapporteur to the Drafting Committee. That circumstance led him to suggest another approach. As he had sought to show, the topic under consideration had been artificially separated from the broader topic of universal jurisdiction, of which it was merely an extension. The topic of universal jurisdiction also fit perfectly well within the framework of the Commission's mandate to promote the progressive development and codification of international law, and the end of the current quinquennium should be the occasion to question States about the possibility of enlarging the Commission's future consideration to universal jurisdiction, including the principle *aut dedere aut judicare*. That question should be highlighted in chapter III of the report, which should enumerate those points on which comments would be particularly useful for the Commission.

56. Mr. McRAE noted that, in his fourth report, the Special Rapporteur had sought to respond to the approach outlined in the discussions in the Working Group[379] and had suggested three draft articles. He welcomed the Special Rapporteur's attempt to move forward with the topic, but he had serious concerns about the draft articles and the analysis on which they were based. With regard to draft article 2, the Special Rapporteur rightly pointed out that the Working Group had observed that the duty to cooperate in the fight against impunity appeared to underpin the obligation to extradite or prosecute, but it was not clear why that duty should be the subject of a separate obligation in the draft articles. The Working Group had been of the view that the duty to cooperate was at the basis of the fight against impunity, but that consideration alone did not justify the formulation of a draft article. The duty to cooperate in the fight against impunity was certainly relevant and must be taken into account in any consideration of the topic, but as a substantive article, it seemed out of place. What was missing in the draft article was an explicit link between the duty to cooperate and the obligation to extradite or prosecute. As suggested by Mr. Murase, the notion of the fight against impunity perhaps belonged in the preamble.

57. As for draft article 2, paragraph 2, he was not sure what was meant by "States will apply … the principle to extradite or prosecute". Was that to suggest that there was a free-standing obligation to extradite or prosecute? If not, and if the point was simply to say that if an obligation existed it should be adhered to, then he did not see why that was needed. Nor did he see the point of draft article 3, paragraph 1, which was self-evident and did not add anything substantively. Further analysis was required.

58. Draft article 4 posed major problems, although it was potentially more promising. The question of customary international law, a subject to which the Commission and

[377] *Official Records of the Review Conference of the Rome Statute of the International Criminal Court*, Kampala, 31 May–11 June 2010 (publication of the International Criminal Court RC/9/11), resolution RC/Res.6, "The crime of aggression", p. 17.

[378] *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

[379] *Yearbook ... 2009*, vol. II (Part Two), p. 143, para. 204.

the Sixth Committee had come back on many occasions, had been a main source of difficulty from the outset. Paragraph 1 likewise stated a self-evident proposition and merely indicated that, if an obligation existed under international law, it must be complied with. Paragraphs 2 and 3 were of greater interest with regard to their substance, as noted by Mr. Perera and Mr. Vasciannie. In those paragraphs, the Special Rapporteur went almost so far as to say that an obligation to extradite or prosecute existed, at least in respect of *jus cogens* crimes. That might be the case, and, if it was, it would be a useful element of progressive development to have a draft article to that effect. However, the Commission did not have the material to reach that conclusion in the form of a draft article. The Special Rapporteur referred in the report to the discussions in the Sixth Committee and saw a changing trend on the question, but it might be asked what weight was to be given to statements made in the Sixth Committee. Were they elements of practice, authoritative guidance or *opinio juris*? In any event, those statements were very divided, and thus it seemed difficult to draw any firm conclusions from the discussions in the Sixth Committee.

59. The fourth report attached great importance to the pleadings by Belgium before the ICJ in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. As pointed out by other members of the Commission, those were pleadings and not a dispassionate analysis on which the Commission could rely. It would not be wise to reach conclusions on the basis of the material contained in the fourth report; more and independent analysis was needed. The Commission could not deal with the question of customary international law without examining how States had incorporated the principle *aut dedere aut judicare* into their national legislation. The Special Rapporteur had referred to that issue in his previous reports[380] and had indicated that he would return to it subsequently, but that had to be done before moving to the question of whether it could be concluded that a principle of customary international law existed. States were very interested in the topic and expected progress to be made, as shown by the discussions in the Sixth Committee (A/CN.4/638, para. 96), but the draft articles in the fourth report were not ready to be referred to the Drafting Committee. He could not endorse the suggestion by Mr. Melescanu and Mr. Perera to annex the draft articles to the annual report of the Commission to the General Assembly, and he agreed with Mr. Nolte that, at the current stage of work, further consideration was needed before the draft articles were submitted to the Sixth Committee. Concerning Mr. Pellet's proposal, he said that it was premature to decide whether to ask the Sixth Committee to link the topic with the topic of universal jurisdiction. For the moment, the Commission should take note of the fourth report and should continue to examine the topic in depth at the 2012 session, following the approach suggested by Mr. Nolte.

60. Mr. HMOUD recalled that the Working Group established by the Commission in 2008[381] had provided guidance and had suggested a structure and a general framework for consideration of the topic. That should make it possible to reach proper conclusions on the sources of the obligation to extradite or prosecute, its content and scope, the conditions for its implementation and its relationship with other legal obligations and principles. In his fourth report, the Special Rapporteur had sought to take steps in that direction by focusing on the sources of the obligation. While there was an ample number of treaties that could constitute a treaty basis for the obligation, the report did not determine whether there was also a basis in customary law. Treaties in areas such as the law of armed conflict, international crimes and judicial cooperation were useful in identifying the obligation and giving direction to parts of the draft articles. Acts which were incriminated under such instruments could provide indications on the content of the obligation. For example, would terrorism or piracy be included in the crimes under the draft articles? Although it was unnecessary for the Special Rapporteur to enumerate the crimes in question, he should be able to find an alternative approach that was suitable for the project. Treaties could also be useful in identifying the conditions for the obligation's application. In certain instruments, the act was defined, and all parties were under an obligation to incriminate and exercise certain forms of jurisdiction under their national law. In others, there was no need for a definition; the act merely had to be criminalized in the legislation of both parties: the party requesting extradition and the requested party. That was especially true in judicial cooperation agreements. Treaties also gave guidance on any exceptions that might exist, for example political crimes or the right of asylum, and under what circumstances. They were also useful in identifying the rights of an individual who was the subject of criminal proceedings relating to the implementation of the obligation. The same could be said about the procedures associated with the obligation, including the process of official communication. In short, treaties provided enough material to be able to codify the rules relating to the obligation to extradite or prosecute. However, that was not achieved in draft article 3, which stated the obvious.

61. As for the basis of the obligation in customary law, further study was needed, in particular with regard to war crimes, crimes against humanity and genocide. It was not sufficient to cite the views of a few members of the Sixth Committee or to quote a counsel in a proceeding or the opinion of a jurist. There were voluminous sources from the proceedings of national courts that could help establish whether the obligation existed in customary international law or whether a norm was emerging in that regard, and for which crimes. That would assist the Commission in determining, as progressive development, whether certain crimes of international concern should be included in the scope of the obligation to extradite or prosecute. For example, no State had a policy of granting safe haven to perpetrators of genocide. Did that mean that there was an *opinio juris* in favour of the existence of a customary rule requiring extradition or prosecution?

62. Draft article 4 did not go in that direction. Paragraph 1 stated the obvious, and paragraph 2 posed a question rather than a rule. With regard to paragraph 3, as others had pointed out, it was not clear whether its purpose was

[380] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report), *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585 (second report), and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report).

[381] *Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 315.

to enunciate the obligation to extradite or prosecute as a peremptory norm or whether it aimed to include in the obligation crimes that violated such norms. Clearly, there was no basis in *jus cogens* for the obligation. However, if the second meaning was intended, it should be borne in mind that such an obligation did not exist in a vacuum. It needed a context, even when it was enunciated as a general obligation. In terrorism conventions, for example, cooperation entailed an obligation to cooperate in the areas of prevention, prosecution, judicial assistance and law enforcement. That obligation could be reflected in the draft articles by specifying the content, as was done in conventions and treaties dealing with international crimes and judicial cooperation. Those instruments were also useful in setting the specific conditions of cooperation. National laws could be analysed to identify the legal mechanisms used by States to cooperate during situations involving extradition or prosecution. That could benefit the draft articles with regard to the duty itself and its implementation. However, that was not done in draft article 2, which provided for the duty to cooperate in the fight against impunity for offences of international concern and then made the obligation to extradite or prosecute an instrument for the accomplishment of that duty. The report did not contain any convincing argument that the duty to cooperate was a basis of the obligation, because there was no context. Moreover, the issue of cooperating in the fight against impunity was not part of the topic, as other members had said, and should at best be referred to in the preamble.

63. The topic should remain on the agenda of the Commission, but there was a need for extensive research within the framework proposed by the Working Group. Draft articles could be produced which defined a comprehensive legal regime on the obligation to extradite or prosecute, but it should be left to the members of the Commission in the next quinquennium to decide whether the draft articles proposed by the Special Rapporteur should be referred to the Drafting Committee and whether the Working Group on the topic should be re-established. He supported the idea of asking States, in chapter III of the report of the Commission, whether the Commission should continue with consideration of the topic as it stood or whether it should be included under the question of universal jurisdiction.

64. Ms. JACOBSSON said she was pleased that the fourth report on the obligation to extradite or prosecute contained three new draft articles, since the way to move forward with the topic was to formulate ideas in draft articles. She did not share Mr. Murase's view that the Commission should suspend or terminate consideration of the topic.

65. In his fourth report, the Special Rapporteur focused on the sources of the legal obligation to extradite or prosecute, and, in so doing, he dealt with three aspects of the obligation: the duty to cooperate in the fight against impunity, the obligation to extradite or prosecute in existing treaties and the principle *aut dedere aut judicare* as a rule of customary international law. Consideration of the sources of legal obligations remained a key aspect of the Commission's work, but it was particularly important for the topic at hand.

66. In draft article 2, the Special Rapporteur pointed to the duty to cooperate in the fight against impunity as a source of the obligation to extradite or prosecute. She subscribed to that idea, and she also thought that the draft articles should contain an article on the duty to cooperate. However, the wording of draft article 2, paragraph 1, was too cautious and should enunciate the duty to cooperate more directly. The formulations "as appropriate" or "wherever and whenever appropriate" were too conditional. The general duty to cooperate in the fight against impunity should be more directly phrased. Moreover, paragraph 1 should be divided into two paragraphs, the first dealing with inter-State cooperation, and the second with cooperation with international courts and tribunals. Although a distinction must be made between extradition and surrender, all forms of cooperation should be included in the article on the duty to cooperate. In addition, the duty to cooperate with the United Nations should be explicitly mentioned, because it was recognized not only in the Charter of the United Nations, but also in other conventions, such as the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), article 89 of which set out an obligation to cooperate with the Organization.

67. In draft article 3, paragraph 1, the Special Rapporteur addressed the case in which the obligation to extradite or prosecute was enunciated in a treaty; the paragraph served as a reminder to States of the old principle *pacta sunt servanda*. That was indeed a central principle of law, but she wondered why it was referred to in that provision.

68. Draft article 3, paragraph 2, was complicated and not entirely clear. It provided that States had an obligation to formulate in their national law the particular conditions for extradition or prosecution "in accordance with the treaty establishing such obligation and with general principles of international criminal law". That was rather confusing. Clearly, a State that was party to a treaty that provided for an obligation to extradite or prosecute had an obligation to ensure that its national law was in conformity with the treaty obligation. The problem was that the paragraph addressed the conditions for both extradition and prosecution, but they were different legal concepts and must be kept separate. There should be one paragraph on the conditions relating to extradition and another on the conditions relating to prosecution.

69. With regard to prosecution, the obligation of the State to see to it that its national law was in conformity with the treaty obligation required it to ensure that the crimes covered by the treaty were criminalized in its territory. The wording "in accordance with the treaty" seemed a little out of place, since the treaty could not lay down domestic rules for the prosecution process, and it was up to the State to decide such conditions, provided that they met the requirements of international law, such as those concerning due process. Paragraph 2 could be simplified. Although national implementation was essential, it was a question of national law.

70. As for extradition procedures, they were also a matter for the domestic legislation of the State. In some instances, bilateral or regional treaties might provide

for competing or parallel international obligations, yet the draft article failed to reflect that reality, although it existed with regard to extradition treaties. Moreover, although it was important in the fight against impunity, the obligation to extradite or prosecute had limits. The principle of *non-refoulement* and the prohibition of the death penalty were therefore crucial in that context, and the Commission should perhaps consider referring to them in the draft articles.

71. On draft article 4, the Special Rapporteur had indicated in his previous report that proving the existence of a customary basis for the obligation *aut dedere aut judicare* was the main purpose of the topic under consideration.[382] She welcomed the draft article on the obligation to extradite or prosecute in customary international law, but from a methodological point of view, she was surprised that the Special Rapporteur had treated the main sources of international law, namely treaties and customary law, separately. Drawing such a distinction between those two sources was not helpful at the current stage, since there were other important sources of international law. What was needed was a conclusion. Thus, she did not think that the title of the article should refer to international custom "as a source" of the obligation.

72. Although States were increasingly willing to conclude treaties containing an *aut dedere aut judicare* clause, State practice had not yet given rise to a rule of customary law in the area. It was important to be particularly cautious when analysing the issue and to differentiate between different categories of crimes. Two examples could serve as illustrations.

73. Grave breaches of the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) were the most prominent crimes that gave rise to an obligation for the State in which the suspect was present to either extradite or prosecute. The State had a choice—extradition or prosecution—but it must not remain passive. That obligation was clearly set out in the provisions of the Geneva Conventions for the protection of war victims and Protocol I. It was likewise clear that the Conventions codified customary law. However, it did not follow that all other war crimes that did not amount to grave breaches gave rise to the obligation *aut dedere aut judicare*. The second example concerned other crimes, such as piracy, which were subject to universal jurisdiction, but not necessarily to the obligation to prosecute or extradite. There, States had the right to prosecute, but the obligation was focused on cooperation. In that connection, draft article 4, paragraph 2, was too vague to be used in a legally binding convention, because it merely provided that an obligation "may" derive from customary norms of international law concerning certain crimes. Although that was not in doubt, the paragraph did not have an operative content. Moreover, the enumeration of crimes in the square brackets was confusing. For example, war crimes were clearly serious violations of international humanitarian law.

74. Admittedly, extensive State practice could be an indication of an emerging rule of customary law. If States acceded to a large number of international treaties, all of which contained a variation of the obligation to extradite or prosecute, that could be seen as strong evidence that they were willing to be bound by that obligation, and such practice might lead to the transformation of that obligation into a principle of customary law. It was a delicate task to determine the status of State practice in that regard, especially since the Commission had not received as many comments from States as it would have liked. Academic writings could not replace State practice as an expression of *opinio juris*. That needed to be made clear when the Commission moved from codification to progressive development, and the starting point should be the Commission's 1996 draft code of crimes against the peace and security of mankind.

75. Given the difficulty of proving the existence of a customary obligation to extradite or prosecute, Ms. Jacobsson agreed with the Special Rapporteur's conclusion in paragraph 86 of the report that the best way to move forward would be to concentrate on identifying those categories of crimes that might create such an obligation. That should be the starting point. She suggested that the Commission proceed with the identification of the different types of crimes. That was not to say that it needed to define all the crimes, but it should take a thorough and systematic look at the different categories. For example, it might be useful to consider crimes under terrorism conventions, as well as State practice, national legislation and the rulings of national courts regarding the crime of genocide, for which the relevant convention did not provide for an obligation to extradite or prosecute. An indicative list of the different categories of crimes could also attract comments from States.

76. With regard to the concept of *jus cogens* as a source of the obligation to extradite or prosecute, there were, as the Special Rapporteur pointed out, differences of opinion among scholars. However, even if crimes were identified that constituted a breach of a *jus cogens* norm, it did not necessarily follow that there was a parallel obligation to prosecute or extradite. She found draft article 4, paragraph 3, somewhat confusing in that regard, probably because there should be a clearer distinction between the response to an act considered to be a breach of a *jus cogens* norm and the procedural consequences that might result from such a breach.

77. She agreed with Mr. McRae and Mr. Nolte that the draft articles should not be referred to the Sixth Committee and that it was up to the Commission to decide how to continue with the topic at the beginning of the next quinquennium.

78. Mr. CANDIOTI said that, in the light of the debate, he agreed with those who thought that it would be premature to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. The problem was not to decide immediately and definitively whether treaties were the sole source of the obligation to extradite or prosecute, as some States asserted, or whether customary law was an earlier source, as other States contended. In pursuing that course, and even

[382] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report), p. 131, para. 126.

assuming that it considered further its study of practice and jurisprudence, the Commission would not be able to move ahead. In any case, the new draft article 2, on the general duty to cooperate in the fight against impunity, was a step in the right direction, since it concerned the principle of general policy on which the obligation to extradite or prosecute was based.

79. However, the Commission must decide whether, as part of progressive development, it should enunciate the obligation to extradite or prosecute for the most serious crimes, namely those that posed a grave threat to the interests and values of the international community as a whole. The basis of the obligation to extradite or prosecute in order to combat the impunity of individuals accused of grave crimes was not clearly established in custom, nor did it emanate solely from specific treaties. The formulation of that obligation must be the expression of the progressive development of international law as set out in article 15 of the statute of the Commission. It should be a new law for the twenty-first century. As Ms. Jacobsson had just pointed out, and as noted by Mr. Pellet, the Commission had already engaged in progressive development by enunciating, in article 9 of its 1996 draft code of crimes against the peace and security of mankind,[383] the obligation to extradite or prosecute with regard to the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. As recalled by the Special Rapporteur in paragraph 91 of his report, the Commission's proposal had served as a model for elaborating the Rome Statute of the International Criminal Court in 1998.

80. The Commission would succeed in overcoming the difficulties if it clearly reformulated, instead of draft articles 3 and 4, the obligation to extradite or prosecute along the same lines and with the same scope as in article 9 of the 1996 draft. If disagreement persisted between a formulation of progressive development of that kind and the acceptance of the obligation solely insofar as it was enunciated in specific treaties, it might be preferable to wait until ideas evolved and it was possible to make progress. To move ahead in the study under consideration, account must be taken of what could be concluded from the study of other topics, such as immunity of State officials from foreign criminal jurisdiction and, possibly, universal jurisdiction. In all three topics, the essence of the question was whether there was acceptance of individual international criminal responsibility and thus of the idea of extraditing or prosecuting, in any national or international jurisdiction, without the benefit of immunity, individuals—whether State officials or not—who were accused of serious crimes that caused grave harm to the interests of the international community as a whole, such as war crimes, crimes against humanity or the crime of genocide. As long as the Commission was unable to answer that question, it would be difficult to make progress on those topics. Perhaps the Commission should consult States on that point in the framework of chapter III of its report to the General Assembly.

81. Mr. FOMBA said that, unlike a number of other members of the Commission, he considered draft article 2 to be entirely relevant, since that aspect of the question constituted the central element of the entire philosophy of international criminal prosecution. Accordingly, the provision had its place in a draft article, and not in the preamble. The criticism of the wording of paragraph 1 for not being sufficiently specific was warranted, since the scope *ratione personae* of the duty to cooperate was somewhat confusing, and because the phrase "crimes and offences of international concern" was not very clear. Mr. Dugard had done well to stress that the principle *aut dedere aut judicare* was applicable solely to domestic courts, unless it was deemed that the surrender of an alleged offender to an international criminal tribunal amounted to an extradition, which was debatable.

82. With regard to draft article 2, paragraph 2, it had been rightly observed that the phrase "wherever and whenever appropriate" was not very clear and needed to be clarified. Important questions arose in that connection, for example regarding the definition of the crimes concerned and also the relevance of *nullum crimen sine lege*, which was more easily conceivable in the context of a pre-established code of crimes such as the one adopted by the Commission in 1996.

83. As had been pointed out by other speakers, draft article 3, paragraph 1, contained a self-evident legal proposition, merely reaffirmed the principle *pacta sunt servanda* and thus was of little use. The wording of paragraph 2 raised questions and required clarification with regard to the "particular conditions" and their legal basis. The same was true for the phrase "general principles of international criminal law".

84. Draft article 4 raised questions and doubts. He shared the Special Rapporteur's reservations with regard to the proof of the existence of a customary obligation. As noted in particular by Mr. Vasciannie, the wording of the article seemed incomplete; it called for a clear and sufficiently corroborated position to be taken through a careful analysis of practice and jurisprudence, which did not seem to have been the case. At the current stage, paragraph 1 postulated the existence of a customary obligation, paragraph 2 the existence of a "hard core" of crimes from which a customary obligation derived and paragraph 3 the existence of an obligation based on *jus cogens*, although that contradicted the argument set out in paragraph 94 of the report. The problem was whether and to what extent international criminal law could be deemed to have the same characteristic as domestic criminal law—a maximum of preciseness and rigour—unless it was considered that it should be otherwise, which he did not. As to whether and to what extent the Commission could or should draw on the line of reasoning used by Mr. David[384] before the ICJ in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, Mr. Melescanu had rightly pointed out that that had been a legal opinion that did not prejudge the decision that the Court would ultimately render in that case.

[383] *Yearbook ... 1996*, vol. II (Part Two), pp. 30–32.

[384] ICJ, Public sitting held on Monday, 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, verbatim record (CR2009/8), pp. 42–44, paras. 19–23 (available from the website of the ICJ: www.icj-cij.org).

85. The proposals made on what the Commission should do and how it should proceed—either to abandon the work on the topic or to suspend its consideration pending the conclusions of the Sixth Committee's Working Group on universal jurisdiction—seemed somewhat excessive and unjustified, since States had not yet clearly and unequivocally disavowed the topic. He endorsed Mr. Pellet's proposal to ask States for their opinion on whether the mandate of the Commission on the topic should be enlarged to include universal jurisdiction.

The meeting rose at 1 p.m.

3113th MEETING

Wednesday, 27 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*continued*) (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/648).

2. Mr. PETRIČ said that he agreed with the view that no general rule existed under customary international law embodying the obligation to extradite or prosecute. He also agreed that the Special Rapporteur's treatment of the topic did not sufficiently address the concept of universal jurisdiction and that more attention should be given to the progressive development of international law, in accordance with article 15 of the Commission's statute. In general, the issues raised in the Special Rapporteur's fourth report warranted further consideration.

3. With regard to draft article 2 and the serious reservations expressed by some Commission members concerning the duty to cooperate, he supported the suggestion that it might be more productive if the Commission identified the categories of crimes that fell within the scope of the obligation to extradite or prosecute. Although the duty to cooperate was well established in international law, including in the Charter of the United Nations, draft article 2, as it was currently worded, appeared to have no practical impact, and he doubted whether it was necessary or useful.

4. Regarding draft article 3, he concurred with the assessment that it was essentially a restatement of the principle *pacta sunt servanda*. Because draft article 3 did not codify an existing customary rule or create a new rule but merely recalled that a State which was bound by a treaty must apply that treaty, it appeared to be of questionable value.

5. With regard to draft article 4, he shared the view that the wording of the text was too conditional and that it was not yet ready for serious consideration or adoption. As it was currently worded, draft article 4 had no binding component and should therefore be reformulated.

6. The Commission's main problem was how to proceed, given that, despite past efforts—including those of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)[385] over the past two years—it had still not made significant progress on the topic. He could not support Mr. Murase's suggestion to suspend or terminate consideration of the topic, as its subject matter was important, timely and relevant. To terminate its consideration would mean that the Commission had not only failed to meet the expectations of Member States to produce worthwhile results after several years' work but had also abandoned the topic prematurely.

7. Since it could be argued that there was no *lex lata* on the obligation to extradite or prosecute, the Commission should deal with the topic for the purpose of developing *lex ferenda*. The Commission's mandate was to both codify existing international customary law and progressively develop it, particularly when the Commission was confronted with a topic of contemporary relevance. The Commission should therefore deal more proactively with the obligation to extradite or prosecute. There was no need to focus on the sources of the obligation, which were uncertain, owing to the lack of any clear *lex lata* on the subject. The Commission should instead direct its attention to the implications of a general obligation to extradite or prosecute and to the practical modalities of its enforcement.

8. The Commission's approach should also reflect the widespread international trend towards guaranteeing the rule of law at both the international and national levels. That trend was reflected, *inter alia*, in activities conducted by the United Nations, such as the establishment of the Rule of Law Unit in the Executive Office of the Secretary-General and the inclusion of an item on the rule of law at the national and international levels in the agenda of the sixty-sixth session of the General Assembly.[386] The interconnection between the rule of law, impunity and the obligation to extradite or prosecute should also be reflected in the Commission's future work on the topic.

9. In his view, the Commission should clearly indicate in its report to the General Assembly on the work of

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[385] *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

[386] General Assembly resolution 65/32 of 6 December 2010, para. 14.